Statement of
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on
States' Rights and Federal Remedies:
When Are Employment Laws Constitutional?
before the
Committee on Health, Education, Labor, and Pensions
United States Senate
April 4, 2001

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify before you on the constitutional status of employment laws in light of the Supreme Court=s recent decisions in this area. As you know, in several recent cases the Supreme Court has held that the Constitution forbids Congress to make state governments liable in damages for violating their employees= rights under federal statutes. In *Kimel v. Florida State Bd. of Regents*, 528 U.S. 62 (2000), the Court held that the Age Discrimination in Employment Act of 1967 (ADEA) could not constitutionally make states liable in damages. In *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001), decided earlier this year, the Court reached the same conclusion about the Americans with Disabilities Act of 1990 (ADA). And in *Alden v. Maine*, 527 U.S. 706 (1999), the Court ruled that a state could not be sued for damages under the Fair Labor Standards Act of 1938 (or, by implication, under any federal law not enacted pursuant to the Fourteenth Amendment) in either state or federal court.

The Supreme Court based these decisions on its interpretation of the Eleventh Amendment and of the principle of state sovereign immunity that, according to the Court, the Eleventh Amendment reflects. In each of these cases, the Court assumed that the states had acted unlawfully. A 5-4 majority nonetheless held, in each case, that the employees could not recover damages for the violation. As a result of these decisions, state employees will often have no remedy even if states engage in conduct that unquestionably violates the employees= rights under federal law.

The importance of these decisions, however, extends even further. In *Kimel* and *Garrett* the same 5-4 majority of the Court held that Congress lacks the power, under the Fourteenth Amendment to the Constitution, to apply the ADEA and the ADA to the states.[1] The Court=s interpretation of the Fourteenth Amendment, like its expansion of the principle of state sovereign immunity, is very significant: The current majority=s hostility to important Acts of Congress regulating the employment relationship and other aspects of the national economy is perhaps the most important development in constitutional law in the last decade, and one of the most important developments of the last generation.

I will attempt today to place these recent developments in a broader historical context. That context shows, I believe, that these recent decisions by the Supreme Court are, historically speaking, acts of extraordinary judicial activism. It would not be quite right to say that they are unprecedented in our history. They do have a precedent: the precedent is the decisions of the pre-New Deal Supreme Court, the *Lochner* Court, so called after the 1905 decision declaring unconstitutional a state law that prescribed a 60-hour maximum work week for bakers. *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner*-era Court invalidated federal labor legislation as well, notably laws forbidding child labor. The decisions of the *Lochner*-era Court were soundly repudiated during the Great Depression, and the rejection of the *Lochner* Court=s approach has been a cornerstone of constitutional law since the late 1930s.

The recent decisions of the current Supreme Court majority are activist decisions cut from the same cloth as the decisions of the *Lochner* Court. These recent decisions are, by contrast, strikingly at odds with the approach taken by the Supreme Court under Chief Justice Earl Warren, the Court most commonly accused of judicial Aactivism.@ The Warren Court,

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[1] The connection between the Fourteenth Amendment holding and the state sovereign immunity holding is that Acts of Congress authorized by the Fourteenth Amendment can override state sovereign immunity, but statutes based solely on the Commerce Clause (or another grant of power in Article I of the Constitution) cannot. In general the constitutionality of antidiscrimination laws under the Commerce Clause has been treated as settled since the Civil Rights Act of 1964 was upheld; in addition, in a case decided in 1983, the Court had held that the Commerce Clause does authorize the ADEA. *EEOC v. Wyoming*, 460 U.S. 226 (1983). As a result, those statutes can still be applied to private employers, and to the states if a plaintiff is not seeking damages.

in sharp contrast to the current majority, went out of its way to expand the power of Congress and to recognize that Congress, not the Supreme Court, has primary responsibility for enforcing the rights of Americans under the Fourteenth Amendment. The actions of the current majority constitute a determined movement away from that important and salutary form of judicial restraint that was—contrary to what one sometimes hears—one of the leading accomplishments of the Warren Court.

I

The Supreme Court first claimed the right to declare Acts of Congress unconstitutional in the famous case of *Marbury v. Madison*, written by Chief Justice John Marshall and decided in 1803. But for almost all of our history, the Court has exercised that power with great restraint. The constitutional flaw that the Court identified in *Marbury* was that Congress had given the Supreme Court itself too much power. Thus the Court in *Marbury* was scarcely setting itself at odds with Congress.

Between *Marbury* and the Civil War, the Court—with one exception—did not declare a single Act of Congress unconstitutional. That one exception was the most reviled decision in the history of the United States Supreme Court, the decision in *Dred Scott v. Sanford*, which effectively denied Congress the power to prevent the expansion of slavery. During these formative decades of the American republic, the Supreme Court issued a number of important decisions striking down acts of state legislatures. But with the exception of the *Dred Scott* decision—an exception that dramatically confirms the wisdom of the rule—the Court did not interfere with Congress=s efforts to exercise the powers granted to it by the Constitution.

The crucial decision that set the Court on this course of restraint, with respect to Acts of Congress, was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), perhaps Chief Justice Marshall=s greatest opinion. *McCulloch* upheld the constitutionality of the Bank of the United States, an institution that was vehemently attacked as unconstitutional by supporters of state prerogatives. The opponents of the Bank pointed out, and Marshall conceded, that the Constitution did not explicitly authorize the federal government to incorporate a bank. But the Court held that the statute establishing the Bank was a legitimate exercise of Congress=s powers under various provisions—such as those empowering Congress to collect taxes, to coin money, and to regulate commerce—when interpreted in light of the Necessary and Proper Clause of the Constitution. That Clause, Article I, Section 8, Clause 18, provides that Congress may enact Aall Laws which shall be necessary and proper for carrying into Execution@ the powers explicitly granted to Congress by the Constitution. Marshall=s famous interpretation of the Necessary and Proper Clause is one of the foundations of the American constitutional order: ALet the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.@ 17 U.S. at 421.

In other words, an Act of Congress, adopted pursuant to a power granted to Congress by the Constitution, is to be upheld by the courts so long as it is Aappropriate@ and Aplainly adapted to@ a legitimate objective. Congress is of course subject to various implicit and explicit constitutional limits on its power. A statute may not, for example, violate rights secured by the Bill of Rights. But so long as Congress has chosen means that are Aappropriate@ and Aplainly adapted@ to a legitimate end, the courts are not to second-guess its judgments.

The Supreme Court followed the approach defined by *McCulloch* throughout most of the Nineteenth Century. The one exception, as I have said, was the disastrous decision in the *Dred Scott* case. It was not until near the end of the 1800s—a century after the ratification of the Constitution—that the Supreme Court went in a different direction, and began to use states=-rights, and states=- prerogatives, as a basis for limiting the power of Congress. Even then, the Court proceeded with some caution. Only in the early decades of the Twentieth Century—the height of the *Lochner* period—did the Supreme Court begin to strike down federal legislation—particularly federal legislation regulating the employment relationship—in earnest.

The most significant of these decisions was *Hammer v. Dagenhar*t, 247 U.S. 251 (1918). *Hammer* held that Congress lacked the power under the Commerce Clause to forbid child labor. The Court reasoned that Congress was not authorized to regulate Apurely local@ matters, such as, the Court believed, the employment relationship in a manufacturing firm. And the Court also suggested that legislation purportedly enacted under the Commerce Clause would be invalid when Congress=s intention was not to regulate commerce but rather to reach matters (such as the age of employees) that would ordinarily not be within Congress=s power.

Hammer v. Dagenhart inspired a ringing dissent from Justice Holmes, and in 1941 the Court unanimously overruled *Hammer* in *United States v. Darby*, the case that upheld the Fair Labor Standards Act—the same statute that *Alden v. Maine* trimmed back. After 1941 the Court turned its back on the approach of *Hammer v. Dagenhart* and never returned—until, arguably, the recent decisions of the current Supreme Court.

To be sure, the Court has not fully returned to the crabbed and dysfunctional approach to the Constitution that it took in *Hammer*. But the *Lochner*-era Court is the closest historical antecedent to the current wave of decisions striking down Acts of Congress. In *United States v. Lopez*, 514 U.S. 549, decided in 1995, the Court ruled, for the first time in almost 60 years, that Congress had exceeded its power under the Commerce Clause. And the decisions in *Kimel* and *Garrett* took an approach to the Fourteenth Amendment that has more in common with *Hammer v. Dagenhart* than with *McCulloch v. Maryland*.

In particular, the majority of the Court in those cases rejected John Marshall=s approach, in favor of something more closely resembling *Hammer v. Dagenhart*, in at least three different ways. First, the Court did not accept Congress=s explanation of Congress=s own objectiveCthe objective of eliminating unconstitutional discrimination by state governments. Instead, the Court examined the background materials and decided that Congress did not have adequate reason to conclude that such discrimination was a problem. Chief Justice Marshall did not question Congress=s motives for establishing the Bank of the United States. But like the opinion in *Hammer v. Dagenhart*Cwhich drips with suspicion that Congress=s purported concern with interstate commerce just masked a desire to do away with child laborCthe current Court evinced unmistakable skepticism about Congress=s conclusion that unconstitutional discrimination by the states was a problem that required a remedy.

Second, the current Court did not confine itself to asking whether the damages remedies that Congress provided in the ADA and ADEA wereCin the language of *McCulloch*CAappropriate@ and Afairly adapted@ to the end of reducing unlawful discrimination by state governmentsCwhich, of course, they clearly are. Instead, the majority applied a requirement of Acongruence and proportionality.@ The exact contours of this requirement remain somewhat ill-defined. But they unmistakably inject the Justices into the legislative task of evaluating the connection between means and ends.

The third way in which the current Court has reproduced the errors of the *Lochner* period is most fundamental. Marshall=s opinion in *McCulloch*, like the Supreme Court after the *Lochner* period, keenly understood the difference between the judicial and legislative functions and did not impose on Congress the norms appropriate to a court. Legislatures do not find facts in the way that courts do; they do not assign fault to specific parties. The Supreme Court in *Garrett* and *Kimel* faulted Congress for not doing just those things. But those are not legislative tasks. A legislative body, by its very nature, responds to a wide range of considerations, not to evidence that can be neatly contained in a record. And a legislative body is designed to try to work out pragmatic solutions to problems, not to adjudicate fault and assess blame. MarshallCwith his willingness to accept Congress=s pragmatic judgment about the need for the BankCunderstood this. The *Lochner* Court, which in many ways saw Congress as a body that should be limited to implementing principles developed by courts, did not understand this distinction. Neither did the Justices who joined *Kimel* and *Garrett*.

II

The contrast between the current Supreme Court and the Warren Court is particularly noteworthy. The Warren Court is sometimes viewed as the classic activist Court, the Court that was most willing to substitute its judgment for those of the people=s elected representatives. And it is of course true that the Warren Court acted when the representative branches of government had failed to do so, most notably in trying to bring an end to state-ordered racial segregation.

But the notion that the Aactivism@ of the Warren Court resembles that of the current Supreme Court is, I believe, quite false. Some of the most important decisions of the Warren Court expanded the power of Congress. The Warren Court left no doubt that the primary responsibility for enforcing the civil rights of Americans under the Civil War Amendments to the Constitution lay with Congress, not the courts. And the Warren Court believed that a vital part of its task was to make it possible for Congress to exercise that responsibility.

The way the Warren Court did this was to incorporate the deferential approach of *McCulloch v. Maryland* into the Civil War Amendments. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443-44 (1968), the Court interpreted the Thirteenth Amendment to incorporate the principle of *McCulloch*. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966), did the same for the Fifteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), suggested an even broader scope for Congress=s power under the Fourteenth Amendment.

The current Supreme Court has not explicitly overruled these decisions. But it has interpreted them narrowly and viewed Congress=s exercises of power far more skeptically and grudgingly than did the Warren Court. The requirement of Acongruence and proportionality@ that proved fatal to Congress=s efforts in the recent cases is an invention of the current Court,

an invention designed to cut back on the expansive scope given to Congress by the Warren Court precedents.

The Warren Court was, of course, vigorous in protecting the rights of racial minorities, of political dissidents, of individuals subjected to the arbitrary power of the state, and (in the Aone person one vote@ cases) of majorities effectively disenfrancised by entrenched minorities. But these were areas in which either the democratic process failed to operate or the democratic process, by its nature, could not be counted on to provide the necessary protection for minority rights. Where the democratic process was open and functioningCwhere Congress had acted to address a problem of national scopeCthe Warren Court continued the tradition of deference to Congress that began with Chief Justice Marshall.

The current Supreme Court shows far less interest in protecting minority rights. If the Court had carried forward the other aspect of the Warren Court=s legacyCdeference to the reasonable decisions of Congress about how those rights should be best protectedCthen one might attribute to the Court a principled belief in judicial restraint, and in facilitating a democratic resolution of hotly contested social issues.

But the current Court has done no such thing. Instead it has intervened to defeat national legislative initiatives. It has done so, in cases like *Kimel*, *Alden*, and *Garrett*, not to protect minority rights, but because of the Court=s own conception about the proper scope of the federal legislative power. Historically speaking, this is an extraordinary posture for the Supreme Court to adopt.

III

There are a number of steps that Congress might take, in the future, to increase the likelihood that laws regulating the employment relationship will survive this exceptionally and, in my view, unwarrantedly rigid scrutiny by the Supreme Court.

To begin with, the Supreme Court has not, so far, been as aggressive in narrowing Congress=s power under the Commerce Clause as it has in narrowing Congress=s power under the Fourteenth Amendment. Even if the Court should become more restrictive in its interpretation of the Commerce ClauseCa distinct possibility, given the staws in the wind (like *United States v. Lopez*) and the Court=s general tendenciesClegislation can be protected from intrusive Commerce Clause review if it includes a provision requiring proof that the activity in question affects interstate commerce: for example, that good made by a firm that discriminates are shipped in interstate commerce. So far, it seems to me, it is not necessary routinely to add such provisions to federal statutes. They would make it more difficult for plaintiffs to establish their right to relief. And, of course, legislation enacted pursuant to the Commerce Clause cannot override a state=s sovereign immunity, so states would not be held liable in damages under such laws.

A second possibility is for suits enforcing antidiscrimination laws, and other laws regulating employment, to be brought in the name of the United States. A suit brought and entirely controlled by the United States itself would, under settled law, not be barred by state sovereign immunity. Moreover, there seems to be no obstacle to the government=s transferring (in whole or in part) any recovery gained in such an action to the private victims of wrongdoing. A more difficult question would be raised if the government were to authorize private parties to bring suit in the name of the United States and to cede control of the litigation to those private parties. In a recent decision, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000), the Supreme Court suggested (although it explicitly refrained from holding) that sovereign immunity might protect states against such suits. Therefore the extent to which the government would have to maintain control of such litigation, in order to escape the bar of state sovereign immunity, remains an open question.

Finally, the government may continue to enforce the rights of employees by requiring that recipients of federal funds comply with federal regulatory requirements. This is, of course, the approach taken by Section 504 of the Rehabilitation Act of 1977, 29 U.S.C. ' 794. Such statutes would be based not on the Fourteenth Amendment or even the Commerce Clause, but on Congress=s power to condition federal grants under the so-called Spending Clause. The Supreme Court has not, so far at least, shown any tendency to try to restrict Congress=s power to condition federal spending in this way. Such regulations would, in most cases, be more limited in scope than direct regulation of the employment relationship, because they would apply only to recipients of federal funds. But this avenue appears to remain a relatively unfettered way in which Congress can protect what it considers to be the rights of individuals in the employment relationship.

I would be happy to answer any questions the Committee might have.